IN THE MATTER OF the Ontario Human Rights 1981, S. O. 1981, c.53, as amended

AND IN THE MATTER OF a Complaint by Jagdish Bhadauria, pursuant to the Human Rights Code, 1981, ss.4(1), 7, 8 and 10 alleging discrimination on the basis of race, colour, ancestry, place of origin, ethnic origin and reprisal

B E T W E E N:

JAGDISH BHADAURIA

Complainant,

- and -

THE TORONTO BOARD OF EDUCATION
AND ITS SERVANTS AND AGENTS

Respondent.

PRELIMINARY AWARD

Board of Inquiry	Paula Knopf
Date and Place of Hearing	June 16, 1987 in Toronto

APPEARANCES:

For the Commission	Raj Anand, Counsel
For the Respondent	Martin Peters, Counsel

Introduction

Jagdish Bhadauria has filed a claim under the Human Rights Code, S.O. 1981, alleging that the respondent, the Toronto Board of Education, has violated the Code by discriminating on the basis of race, colour, ancestry, place of origin and ethnic origin. In a nutshell, the complainant alleges that since 1981, he was discriminated against when denied 41 applications for a promotion to Vice-Principal. An original complaint was filed on December 22, 1983 (see Appendix 1). It was amended on October 16, 1985 (see Appendix 2). Five other related complaints were filed by the complainant on June 20, 1984. These complainants were further refined by letters dated June 10, 11 and 12 (see Appendixes 3, 4 and 5) from Counsel for the Commission in response to requests for particulars from the respondent (see Appendix 6). The issues raised in the complaint are complex and the parties have scheduled 20 days of hearings in the months to come. However, in an attempt to clarify the issues and the scope of the complaint, the respondent has brought a preliminary motion before this Board of Inquiry seeking the following orders:

(a) Further and better particulars of the amended complaint filed the 15th and 16th of October 1985;

(b) striking out all or a portion of the complaints as statute barred; and

(c) striking out all or a portion of the complaints as they constitute a claim for a class action not permitted by the Ontario Human Rights Code.

The details of the particulars which are being sought are contained in the letter from counsel for the respondent dated June 10, 1987 (see Appendix 6).

At the outset of the preliminary motion, counsel for the respondent indicated that while he was not abandoning the position that the complaints constitute a class action, he was choosing not to pursue that position at this moment and would reserve argument on the position to be raised later at the conclusion of the evidence. Thus, there shall be no further discussion of that issue at this time.

Request for Particulars

I shall deal first with the request for particulars. In the course of the submissions on this issue, counsel for both parties gave mutual undertakings to provide to each other full and complete discovery of documents and names of witnesses. Thus, much of the information sought by counsel for the respondent in his June 10th letter (Appendix 6) will be provided on consent and need not be discussed in this ruling.

Further, counsel for the Commission clarified that the complainant's case would be based upon a claim under section 10 of the Code alleging constructive discrimination as opposed to founding the claim under section 4 of the Code. However, it was stressed that the constructive discrimination would be alleged to be based on the prohibited grounds enunciated in Section 4 of the Code. This clarification was helpful to both the Board of Inquiry and the Board of Education.

In considering the question of how much particularization is due to a respondent in a Human Rights

Inquiry, the parties agree that Section 8 of the Statutory Powers Procedure Act, R.S.O. 1980 applies:

> Where the good character, propriety of conduct or competence of a party is in issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

There is no question that the propriety of the respondent is in issue in this case. The application of Section 8 of the Statutory Powers and Procedure Act to Human Rights inquiries was summarized by Professor Gorsky in Walbar Machine Products of Canada Limited and Ontario Human Rights Commission 1980 C.H.R.R. p. D228 at paragraphs 2006 and 2016:

> 2006 My view of s. 8 of the Act is that it was introduced to regulate one aspect of procedural natural justice which must be followed by certain tribunals including a Board of Inquiry appointed pursuant to s. 14(a)(1) of the Code. Whatever the scope of the information which must be furnished, its purpose is to define the issues and thereby prevent surprise by enabling the party against whom the allegations are made to prepare for the hearing....
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> 2016 My interpretation of a s. 8 is that it is concerned with the furnishing of "reasonable information of ... allegations ..." and not with the means whereby those allegations will be proved. It is concerned with particulars to know a case and not with evidence as to how the case will be proved. It is concerned with the case intended to be made and not with the information allegedly favourable or unfavourable to the case. Furthermore, it is not concerned with facts which might assist the party against whom the claim is being made, to discover evidence in support of its defence, as contrasted with information of the case to be met, although I would expect that the Commission would, at the hearing, adduce evidence arguably favourable as well as unfavourable to Walbar.

I am in agreement with this analysis of Professor Grosky and it is clear that both parties agree that the respondent is entitled to an outline of the material facts that the Commission intends to rely upon in the presentation of its case.

In his submissions, counsel for the Board of Education stressed that there were four main areas where further and better paticulars were required to meet the test of disclosing material facts and to enable the Board of Education to adequately prepare its defence of the matters. These four main areas of concern are:

(a) Promotional policies, procedures, and criteria employed by the Board of Education in selecting vice-principals that will be relied upon, details by which the reliance on the criteria are work-related and the nexus between the use of such criteria to persons of South Asian origin and to Mr. Bhadauria.

(b) Details to be relied upon to support the allegation of discrimination with regard to nine specific unsuccessful promotional applications which have been listed by the complainant.

(c) A comprehensive list of the "criteria" the Commission will allege are "insufficiently related to the work required and which adversely affect persons of South Asian origin".

(d) A full statement of material facts to be relied upon by the Commission with respect to each of the nine specified schools.

Counsel for the respondent also reinforced the request for particulars contained in the appended correspondence and argued that they were all necessary for a full and fair hearing of the issues. Counsel relied upon the following cases: Crown & Law Society of Upper Canada (1980), 28 O.R. (2d) 61; Walbar Machine Products of Canada Limited v. Ontario Human Rights Commission [1980] C.H.R.R., D228 and Cynthia Joseph v. Keith Jack General Hospital et al, [1982] 3 C.H.R.R., D854.

Counsel for the Commission submitted that his correspondence of June 10 satisfied any formal requirements for paticulars and constitutes the full amended claim that the Commission wishes to present in this case. Further, the June 12th letter amounts to a further amplification of the June 10th documents and adds particulars that should satisfy the respondent. Finally, it was submitted that much or most of what the respondent was seeking by way of particulars is within its own knowledge or is a quest for disclosure of evidence as opposed to a request for material facts. Counsel referred me to the following cases: Lawrence Bezeau v. Ontario Institute for Studies and Education [1982], 3 C.H.R.R. D874; Judy Salamon v. Searchers Paralegal Services et al., unreported decision of F. H. Zemas, April 28, 1987; Paul Campbell et al v. Hudson Bay Mining & Smelting Co. Limited [1984], 5 C.H.R.R. 2268; and Ontario Human Rights Commission v. The Crown in Right of Ontario, unreported decision of F. H. Zemas, November 24, 1986.

Having carefully considered the parties' positions, I have reached the following conclusions. First, the civil procedure concept of furnishing "particulars" is analogous but not identical to the requirements of the Statutory Powers Procedure Act. The Legislature could easily have drafted Section 8 of the Statutory Powers Procedure Act to require

that particulars of allegations be furnished to the respondents in hearings such as these. This would have imported the jurisprudence which identifies particulars and eventually leads to discovery of the opponent's case. But Section 8 puts a different onus on the parties. It simply requires that reasonable information be given of any allegation with respect to a claim impugning character or conduct. "Reasonable information" is not as rigid a requirement as the furnishing of particualrs. It only requires that the respondent has sufficient information about the allegations to prepare itself to answer the allegations.

I agree with counsel for the respondent that the form of the information provided in the Commission's letters of June 10, 11 and 12 leaves the reader with some work to do piecing the pieces of information together on a subject by subject basis. The correspondence deals with issues on a piecemeal basis and is understandably an attempt to satisfy the respondent's counsel as expeditiously as possible. Therefore, there is not one document summarizing each issue in full, Instead, the three letters must be read together to comprehend the Commission's full position. This is both unfortunate and confusing. But this lack of elegance in form does not offend Section 8 of the Act. The letters of June 10, 11 and 12, read together, do, for the most part, satisfy the standards of supplying reasonable information to the respondent regarding the complaints. There are only two areas where further information is required. First, the Commission must supply the respondent with the names of all the schools and applicable dates where the Commission intends to allege discrimination in the process of applying for promotion. The necessity of doing this has already been conceded by the Commission, but it is also recorded herein as a formal order of this Board of Inquiry.

Secondly, paragraph 3(b) of the June 10th letter of Mr. Anand (Appendix 3) cannot be accepted as satisfying Section 8 of the Statutory Powers Procedure Act. Paragraph 3(b) reads:

> Criteria used to assess persons during interviews are developed in a manner that permits the use of requirements that are insufficiently related to the work required and which adversely affect persons of South Asian origin,
>
> Such criteria include:
>
> - "warmth and openness";
> - "sense of humour" and "gentleness";
> - "articulateness" and "giving replies in depth";
> - involvement in the life of a school.
>
> [emphasis added]

If the Commission intends to allege that certain "criteria" are improperly utilized in the assessment process, it is not sufficient to present a partial list to the respondent and leave open the chance to add other criteria by using the words "include" at the head of the list. The respondent is entitled to notice of the allegedly offensive criteria prior to the hearing. This falls squarely within the requirement of having to provide reasonable information of the allegations.

I recognize that the evidence at the hearing may reveal criteria that were utilized by the respondent which were heretofore unknown to the complainant prior to the actual hearing. This is so because the formulation and utilization of criteria are far more within the knowledge of the respondent than the complainant. Should that be the case, the issue can be addressed to the Board of Inquiry at the hearing for further ruling. But, the respondent is nevertheless entitled to as comprehensive a list as is

possible as it approaches the hearing and paragraph 3(b) of the June 10th letter does not satisfy this requirement. The Commission is therefore ordered to furnish such a list to the respondent on or before February 1, 1988. That date is approximately two months before the first date scheduled for the resumption of these proceedings and should give the respondent adequate time in which to prepare its defence.

In all other aspects of the request for particulars contained in the respondent's letter of June 10, it is the conclusion of this Board that the correspondence from counsel for the Commission contained in the letters of June 10, 11 and 12 adequately satisfy the requirements of Section 8 of the Statutory Powers Procedure Act.

Limitations Issue

The second issue raised by the respondent concerns the application to strike out a large portion of the complaints as being statute barred. The claims, as amended and particularized, allege 41 instances of violations of the Human Rights Code with regard to rejected applications for promotion. The original complaint was filed on December 22, 1983. The dates of the events giving rise to the alleged violations go back to 1981. The respondent relies upon the Limitations Act, Section 45(1), and the decision in West End Construction Ltd. et al. and Ministry of Labour for Ontario, et al. (1980), 57 O.R. (2d) 391 (Div. Ct.) to assert that any part of this complaint that predates the date of the filing of the complaint by two years should be statute barred. The Limitation Act provides:

> 1. In this Act,
>
> (a) "action" includes an information on behalf of the Crown and any civil proceeding;

> 45.-(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
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> ....
>
> (h) an action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved, within two years after the cause of action arose;
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> [emphasis added]
>
> ....
>
> (2) Nothing in this section extends to any action where the time for bringing the action is by any statute specially limited.

The Divisional Court in the West End Construction case, supra, was faced with the question of whether a hearing under the Human Rights Code before a Board of Inquiry constituted an "action" within Section 1(a) of the Limitations Act. The Divisional Court concluded that such a hearing was an action within the Limitations Act. The Court also asked itself whether such a proceeding was an "action ... for damages" or "a sum of money given ... by statute ... to the party aggrieved." In deciding in the affirmative, it was also concluded that Section 45 of the Limitations Act applied. Given that complainants were seeking recovery of compensation and that a claim under the Code is the only "machinery" available to pursue compensation for violations of the Code (see Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria (1981) 124 D.L.R. (3d) 193), it was concluded that Inquiries under the Code were covered by Section 45(1)(h) of the Limitations Act. The policy to support these conclusions was articulated at pages 401 and 402 of the West End Construction decision:

> Stale claims under the Code present a particular hazard. The conduct which may bring into operation the machinery of the Code is difficult of precise definition and, perhaps of necessity, somewhat

> amorphous. The prosecution of a complaint under the Code is onerous, and potentially oppressive of a person whose conduct is called in question. Such a person is required to make defence, with all the attendant apprehension and expense, of a proceeding which may be, and frequently is, protracted in its nature, and painful in its circumstances. The board of inquiry is not constrained by the rules of evidence. The safeguards which attend ordinary litigation, such as production and discovery, are not present. A person can be subjected to substantial liability (as in this case) upon evidence and procedure which would never be countenanced in a court of law. I fully recognize that the Legislature has deemed this potentially oppressive legislation necessary to combat the evil at which it is aimed, and that is entirely within the competence of the Legislature. But, in my view, it is only reasonable that persons should be protected from exposure to such proceedings arising out of events long past. It is notorious that even where there are real safeguards in place, evidentiary problems are generally increased with the passage of time from the event upon which the evidence bears.

Thus, the Divisional Court ruled that the two-year limitation period under the Limitations Act applied to proceedings under the Human Rights Code. Therefore, the respondent is seeking an order barring any claims by the Commission or the complainant for any events which occurred two years prior to the filing of the complaint.

In response, counsel for the Commission argued that the West End Construction case, supra, simply has no application to the facts at hand because it was decided under the previous Code and before Section 33(d) of the present Human Rights Code came into effect. The present Code applies to this case and provides:

> 33.(1) Where it appears to the Commission that, ...
>
> (d) the facts upon which the complaint is based occurred more than six

> months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
>
> the Commission may, in its discretion, decide not to deal with the complaint.

Counsel for the Commission argued that complaints under the Human Rights Code now must be considered as actions, brought by way of statute which are "specially limited" by their own limitation provisions as is contemplated by section 45(2) of the Limitations Act. Thus, they ought not to be time barred except to the extent of the exercise of the Commission's discretion under Section 33(d) of the Code which is only reviewable by an application to the Supreme Court of Ontario to challenge the Commission's exercise of its discretion under that provision. Counsel for the respondent countered that argument by suggesting that Section 33(d) of the Code does not constitute a "special limitation" because of the discretionary factor vested in the Commission. The fact that the Commission has a discretionary power that is capable of extending the limitation provision was said to result in the inevitable conclusion that Section 33(d) of the Code could not be considered as "special limitation" within the meaning of the Limitations Act, section 45(2).

Further, counsel for the Commission argued that Section 33(d) of the Code is a specific provision that would override the general provisions of the Limitations Act. Further, or in the alternative, it was argued that the human rights legislation prevails over the Limitations Act. Counsel referred this Board to the following cases: R. v. Manninen, unreported decision of Supreme Court of Canada, released June 25, 1987; Action Travail des Femmes v. C.N.R., unreported decision of the Supreme Court of Canada, released

June 25, 1987; Insurance Corporation of British Columbia v. Heerespink [1982], 3 C.H.R.R. 1163; Tabar et al. v. Scott & West End Construction Limited [1982] 3 C.H.R.R. D1073; Dhallwal v. B.C. Timber Ltd. [1983], 4 C.H.R.R. D1520; Seneca College and Bhadauria (1981) 124 D.L.R. (3d) 193 (S.C.C.); and Winnipeg School Division No. 1 and Carter et al. (1985) 21 D.L.R. (4th) 1 (S.C.C.).

In reply to this, counsel for the respondent listed the many statutes which narrow and refine limitation periods for special actions in Ontario, i.e. Absconding Debtors Act, R.S.O. 1980, c. 2, section 12(2); Ambulance Act, R.S.O. 1980, c. 23(4) and 25, Assessment Act, R.S.O. 1980, c. 31, section 51, to name a few. Further, it was argued that section 33(1)(d) of the Code is not a limitation period because it does not meet the definition of prescribing a measure of time within which proceedings to enforce a right must be taken, Jowat's Dictionary of English Law Vol. 11, p. 1107. It was said that in order for the Code to be considered to contain a limitation provision, the provision would have to be mandatory, which it is not.

The parties agreed that the Board should remain seized with the question of when the limitation period should run with the many fact situations that could arise in the case and that this would more appropriately be dealt with once the facts in the case were elicited.

The key to the respondent's argument is the applicability of the West End Construction case, supra, to the fact situation raised in the case at hand. At the time of the release of this preliminary award, leave has been granted to appeal to the decision in West End to the Court of Appeal. But both parties agree that this Board of Inquiry is bound by the Divisional Court ruling as it presently stands if the principles apply to the case of Mr. Bhadauria. In

deciding the issue, it is important to note that since the West End Construction case arose, the Legislature has amended the Human Rights Code to include Section 33(1)(d) of the Code which is quoted above. The Divisional Court commented upon this at page 402 of the West End Construction case:

> In this context I think it significant to observe that since events which gave rise to the case before us the Code has been amended to include the following provision:
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> 33(1) Where it appears to the Commission that,
>
> . . . . .
>
> (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
>
> the Commission may, in its discretion, decide to not deal with the complaint.
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> This newly created protection, fragile though it is, being dependent upon an unfettered discretion, is evidence of legislative recognition that injustice lurks in stale claims; and the period chosen is six months.

The unavoidable conclusion that must be drawn from this obiter dicta from the Divisional Court is that the passage of Section 33(1)(d) has added protection to respondents in Human Rights complaints that was not previously in existence by creating a discretionary six-month time bar for proceedings.

Counsel for the Commission argues that the inclusion of Section 33(1)(d) of the Code removes the Bhadauria complaint from the applicability of the West End Construction case to our case. It is to be remembered that Section 45(1)(h) of the Limitations Act does not apply where there is

something in the applicable legislation which makes the time for bringing the action specially limited.

We start first by accepting from the West End decision that a Human Rights complaint is "action" within the meaning of the Limitations Act. The question then becomes whether Section 33(1)(d) can now be read as something within the Human Rights Code that specifically limits the time for bringing an action. Certainly, the section is not so specific or mandatory as is found in legislation that absolutely prohibits the bringing of an action after a certain length of time and gives no official discretionary power to waive or extend the time to either the courts or the administrative body which applies the legislation. But section 33(1)(d) does put real limits upon the time within which an action may be brought under the Human Rights Code. While the exercise of the Commission's discretion under Section 33(1)(d) may be broad, it requires the Commission to be satisfied that any delay beyond six months was incurred in good faith and that no substantial prejudice resulted to the respondent. This puts a direction upon the otherwise unlimited discretion that could be vested in an official body. Also, it enables an aggrieved party to challenge the exercise of discretion in the Divisional Court where perceived cause exists. Like the Human Rights Code, many acts also have limitations but also contain express allowances for the extension of the time provisions either by the applicable governing body or by the courts. For example:

1. An Act to Revise The Professional Engineers Act, S. O. 1984, c. 13, s-s 47(2);

2. Judicial Review Procedure Act, R.S.O. 1980, Chapter 224, Section 5;

3. An Act To Revise the Family Law Reform Act, S.O. 1980 1986;

4. Compensation for Victims of Crime Act, R.S.O. 1980, Chapter 82, Section 6; and

5. Insurance Act, R.S.O. 1980, Chapter 218, ss. 253 and 254(6).

If the respondent's argument is correct, even the exercise of the discretion granted by these Acts would be limited by the two-year limitation provision in section 45(1)(h) of the Limitations Act. But that cannot be and is not so. Section 33(d) of the Human Rights Code must be read as a section which does limit the time for the bringing of an action and as a direction to the Commission on how to exercise its discretion if it is required to decide whether to go beyond the six-month period. The Limitations Act cannot be read as a further fetter on the exercise of that discretion.

Further, the importance of the fact that we are dealing with Human Rights legislation cannot be ignored. The words of the Supreme Court of Canada are to be noted in their decision of Winnipeg School Division No. 1 and Craton et al. 21 D.L.R. (4d) 1, at page 6:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.

We also note the recent direction of the Supreme Court of Canada in the Action Travail des Femmes v. C.N.R. case, supra, at p. 18:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts the statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the Interpretation Act R.S.C. 1970, c. I-23 as amended.

Applying that principle to the facts at hand, it must be concluded that section 33(d) of the Human Rights Code cannot be altered or amended by the Limitations Act to add a further two-year provision or limitation upon the bringing of complaints because there is no clear legislative pronouncement that the Limitations Act, section 45(1)(h), should still apply after Section 33(d) was passed.

Thus, the inclusion of section 33(d) in the Human Rights Code has relieved complainants such as Mr. Bhadauria from the strictures of the Limitations Act and opened up the possibility of filing complaints to the extent that there is no longer a fixed period within which an action must be brought. Instead, the period is unlimited except that after six months, the Commission can only proceed if it is satisfied that no substantial prejudice would result if the action is based on complaints preceding six months before the complaint is filed. Thus, both parties gain better and further protections. Whether the Commission has exercised

its discretion properly in this case is a matter for the Supreme Court of Ontario and not for this Board of Inquiry to consider. To date, there has been no suggestion that the Commission has exercised its discretion improperly in this case.

This Board of Inquiry also wishes to emphasize that this ruling in no way ignores the real difficulty facing the respondents who are required to defend allegations covering long periods of time. This is especially so where the proceedings have taken so long to be processed, prior to being brought before this Board of Inquiry. But all of that is relevant to the issue of remedy and I shall be open to further argument on these matters in that context.

In the result, therefore, it is concluded that the Limitations Act, section 45(1)(h) no longer has any application to proceedings under the Human Rights Code.

As per the agreement of the parties, the matter is now adjourned to the dates mutually agreed upon for the resumption of the proceedings.

Dated at Toronto, Ontario this 30th day of July, 1987.

Paula Knopf
Board of Inquiry